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No. ..-...

IN THE

Supreme Court of the United States

October Term, 1982

CITY OF LONG BEACH,

Petitioner,

vs.

RICHARD BOZEK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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Question Presented.

Whether the right of an individual to sue a public entity maliciously and without probable cause is absolutely privileged by the First Amendment to the United States Constitution.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Petitioner, the City of Long Beach, a Municipal Corporation, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of California, entered in the above entitled case on June 1, 1982.

Opinion Below.

The judgment and opinion of the Supreme Court of the State of California is reported, *City of Long Beach v. Richard Bozek*, (1982) 31 Cal. 3d 527, 183 Cal. Rptr. 86, 645 P. 2d 137, and is attached hereto and designated Appendix A.

Jurisdiction.

The judgment and opinion of the Supreme Court of the State of California was rendered on June 1, 1982, and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1257(3).

Statement of Case.

On June 11, 1974, defendant Richard Bozek filed a lawsuit against the City of Long Beach and two City police officers for false arrest, false imprisonment, assault and battery, and negligent hiring. Pursuant to the requirements of California law, the City Attorney's Office of the City of Long Beach was required to, and did, defend the City and the two officers. On March 29, 1979, judgment was entered after a jury verdict in favor of the City and the two officers, and against Bozek.

Thereafter, the City and the two police officers filed a complaint for malicious prosecution against Bozek. That complaint, which is attached hereto and designated Appendix B, alleged inter alia:

1. The original lawsuit was brought without probable cause in that Bozek did not honestly and reasonably believe that there were grounds for his action;
2. Bozek acted maliciously in bringing the action, in that he knew that the allegations contained in his complaint were false and acted with the purpose of annoying and wronging the plaintiffs;
3. The initial action had terminated in favor of the City and the officers; and
4. The plaintiffs had suffered damages as a result of Bozek's lawsuit. The damages sought by the City included only costs and attorney's fees in defending the original action.

Bozek filed a demurrer to the City's portion of the complaint, which was sustained without leave to amend, on the ground that municipalities should not be permitted to sue for malicious prosecution.

The City duly appealed to the Court of Appeal of the State of California, Fourth Appellate District, Division Two. Bozek's primary contention was that an action against

a municipality for false arrest and related torts was *absolutely* privileged under the First Amendment to the United States Constitution as a petition for redress of grievances.

The Court of Appeals concluded, inter alia, that the constitutional right to petition for redress of grievances does permit a citizen to file a lawsuit in appropriate circumstances against a governmental agency such as a municipality. However, the privilege is qualified, not absolute. The institution and maintenance of a lawsuit for false arrest and related torts against a municipality, with actual malice and without probable cause, is not absolutely privileged under the First Amendment to the United States Constitution.

Bozek thereafter appealed to the Supreme Court of the State of California. The Supreme Court affirmed the judgment of the trial court, holding that a municipality may not recover its expenses incurred in successfully defending against a lawsuit, even though that lawsuit be filed maliciously and without probable cause. The Court reasoned that to allow the maintenance of such a lawsuit by a governmental entity would generate a potentially chilling effect on the exercise of the right to petition the government through the courts for redress of grievances in violation of the First Amendment to the United States Constitution. Thus, held the Court, the maintenance of lawsuits against governmental entities is absolutely privileged, and cannot provide a basis for the imposition of civil liability for malicious prosecution.

REASONS FOR GRANTING THE WRIT.

THE CALIFORNIA SUPREME COURT IMPROPERLY INTERPRETED THE SCOPE OF THE RIGHT TO PETITION CONTAINED IN THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. There Exists No Basis in Law or Reason for the Conclusion That a Public Entity Is Precluded by the Constitution From Pursuing a Malicious Prosecution Action.

Contrary to the holding of the California Supreme Court, the First Amendment to the United States Constitution does not create an absolute privilege to sue a governmental entity maliciously and without probable cause.

The State cause of action for malicious prosecution asserted by the petitioner City of Long Beach (hereafter petitioner) is identical to that common law cause of action recognized by the United States Supreme Court. The petitioner alleged in its complaint all the elements necessary to a cause of action for malicious prosecution. In addition to alleging that the original lawsuit was terminated in favor of the petitioner, it was alleged:

> (1) That the original lawsuit was brought without probable cause in that Bozek did not honestly and reasonably believe there were grounds for his action; and
>
> (2) That Bozek acted maliciously in bringing the action, knowing that the allegations were false and acting with the purpose of annoying and wronging the petitioner.

These are the classic elements of a cause of action for malicious prosecution under the common law and as recognized in the State of California. (*Stewart v. Sonneborn*, [1878] 98 U.S. 182; *Crescent City Livestock Company v. Butcher's Union Slaughterhouse Company*, [1887] 120 U.S. 141, 30 L.Ed. 614, 7 S.Ct. 472; compare *Bertero v. Na-*

tional General Corporation, [1974] 13 Cal. 3d 431, 118 Cal. Rptr. 184, 529 P. 2d 608.)

The court below recognized in general the valid policy considerations which are furthered by allowing individuals and non-individuals to sue for malicious prosecution. Those policies include:

> 1. The right of compensation for expenses incurred in defending a suit;
>
> 2. The significant interest of the courts and the public in promoting the efficient administration of justice by discouraging baseless lawsuits.
>
> (Appendix A, Majority Opinion, page 3.)

Further, historically, courts throughout the United States recogniz that these legitimate interests are promoted by the tort of malicious prosecution. (*Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 Yale L.J., 1218.)

The court below goes on, however, to single out governmental entities, asserting that the original act of filing the lawsuit against the petitioner was an exercise of Bozek's right to petition his government for redress of grievances under the First Amendment to the United States Constitution. Thus, holds the court, the protection of the First Amendment confers an absolute right to sue a governmental entity maliciously and without probable cause with total impunity.

> ". . . we hold that governmental entities may not maintain actions for malicious prosecution against those who have previously sued such entities without success; the bringing of suits against the government is absolutely privileged and cannot form the basis for imposition of civil liability for malicious prosecution."
>
> (Appendix A, Majority Opinion, page 13.)

In this assertion the court below is plainly wrong.

It should be noted at the outset that the petitioner does not quarrel with Bozek's contention that the act of filing the original lawsuit for false arrest and related torts is privileged. However, even assuming that Bozek's lawsuit constituted a petition for redress of grievances shielded by the First Amendment to the United States Constitution, it does *not* follow, nor has the United States Supreme Court ever held, that that privilege is *absolute*. On the contrary, this court has held that knowing falsity is not constitutionally protected.

In *New York Times Company v. Sullivan*, (1964) 376 U.S. 254, 11 L. Ed. 2d 686, 84 S.Ct. 710, an action for libel by a public official against a newspaper, the court sets forth the constitutional standard to be applied:

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. 279-280. (See also *Rosenbloom v. Metromedia, Inc.*, [1971] 403 U.S. 29, 29 L. Ed. 2d 296, 91 S.Ct. 1811.)

New York Times does not give protection to knowing falsity and does not find that the imposition of liability for the publication of knowingly false statements would create an impermissible chilling effect on the exercise of free speech. Employing the rationale of the *New York Times* case, the thrust of the petitioner's cause of action clearly aims at conduct which is *not* constitutionally protected, *i.e.* the act of filing a lawsuit with malice and with the knowledge that the allegations contained therein are false.

Further, the elements of a cause of action for malicious prosecution with regard to the requirement of intent impose

an even stricter standard than that of *New York Times*. The petitioner must prove not only the existence of malice, but also a lack of probable cause in instituting the action in the first instance, which is a concept separate and in addition to malice. (*Stewart v. Sonneborn, supra; Crescent City Livestock Company v. Butcher's Union Slaughterhouse Company, supra.*) In California, the concept of probable cause with respect to malicious prosecution actions has been explained in the following terms:

> "A person who attempts to establish a claim . . . knowing of its falsity, can only be motivated by an improper purpose . . . since probable cause requires a reasonable belief in the validity of the claim asserted . . ., the allegations that the action was prosecuted with knowledge of the falsity of the claim are a sufficient statement of a lack of probable cause."
> *Albertson v. Raboff*, (1956) 46 Cal. 2d 375, 382, 383, 285 P. 2d 405.

It is further submitted that the *Albertson* court correctly set forth the distinction between an absolutely privileged communication and a malicious prosecution action in general:

> "The fact that a communication may be absolutely privileged for the purpose of a defamation action does not prevent its being an element of an action for malicious prosecution in a proper case. The policy of encouraging free access to the courts that underlies the absolute privilege applicable in defamation actions is outweighed by the policy affording redress for individual wrongs when the requirement of favorable termination, lack of probable cause, and malice are satisfied." (At page 382.)

The court below has improperly singled out public entities and prevented only public entities from attempting to recover for damages sustained as a result of a malicious and

knowingly false lawsuit. Yet the right of a public entity to recover the public funds employed to defend against lawsuits prosecuted against it maliciously and without probable cause is as important to its taxpayers and the public treasury as the right of an individual or a private corporation for its expenses of defense.

The *California Government Code* requires that the city provide a defense for any employee sued in the course and scope of his employment. (Government Code Sec. 825.) In this regard it should be emphasized that the petitioner seeks only to recover its *attorney's fees* expended in the initial action. Thus, the sum sought to be recovered is far more certain, and less speculative, than those additional damages normally sought in a malicious prosecution action, *i.e.* general damages for pain and suffering and/or punitive damages. (See Restatement of the Law of Torts 2d, Secs. 681, 908, 909 [1977].) It is simply unreasonable to single out public entities and prevent them alone from recouping these expenses.

Additionally, as so aptly articulated by Mr. Justice Kaus in his dissent, the majority opinion of the court does not withstand logical scrutiny. First, on the one hand the court implies that the filing of a lawsuit against a public entity represents an exercise of the constitutional right of petition, while on the other hand, a suit between two private parties does not involve the exercise of this constitutional right. Yet, the United States Supreme Court has clearly and repeatedly held that the right to petition the government for redress of grievances encompasses the right of one private party to sue another *private* party. (*California Transport v. Trucking Unlimited*, [1972] 404 U.S. 508, 510, 30 L. Ed. 2d 642, 92 S.Ct. 609; *United Transportation Union v. Michigan Bar*, [1971] 401 U.S. 576, 28 L. Ed. 2d 339, 91 S.Ct. 1076; *Mine Workers v. Illinois Bar Association*,

[1967] 389 U.S. 217, 19 L. Ed. 2d 426, 885 S.Ct. 353; *Railroad Trainmen v. Virginia Bar*, [1964] 377 U.S. 1, 12 L. Ed. 2d 89, 84 S.Ct. 1113.) If the constitutional right to petition includes the right of one private party to sue another private party, then that right is either absolute or qualified. If the right is absolute, then *all* malicious prosecution actions would be unconstitutional. This conclusion, however, is contrary to the holding in *Stewart v. Sonneborn, supra.* Thus, it is submitted, the only reasonable interpretation of those cases dealing with the constitutional right to petition, in conjunction with those cases dealing with malicious prosecution, is that the filing of a lawsuit, whether it be against a governmental entity or against a private party, is constitutionally protected by the right to petition the government for redress of grievances, *but* that that privilege is qualified, *i.e.* the privilege ceases to exist when the original lawsuit is filed with malice and without probable cause.

Second, again as pointed out by the dissent, it makes no sense to say that the act of filing a lawsuit against a public entity is absolutely protected, while at the same time conceding that knowingly filing a false claim preliminary to that lawsuit can properly subject the claimant to criminal sanctions, pursuant to *California Penal Code* Sec. 72. Additionally, various statutes impose criminal penalties for false or fraudulent monetary claims filed with a public entity (*e.g.*, California Welfare and Institutions Code Sec. 11483; 18 U.S.C. Secs. 286-289).

The inconsistency in the court's position is further emphasized by the fact that under the Federal Civil Rights Act (42 U.S.C. §1981, et seq.), a plaintiff may be required to pay to the defendants reasonable attorney's fees.

> ". . . in any action or proceeding to enforce a provision of Sections 1981, 1982, 1983, 1984 and 1986 of this Title . . . the court in its discretion may allow

the prevailing party other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. §1988.

Since the United States Supreme Court decision in *Monell v. Department of Social Services*, (1978) 436 U.S. 658, 56 L. Ed. 2d 611, 98 S.Ct. 2018, a public entity may properly be sued as a party defendant under the Civil Rights Act. In order for the award of attorney's fees against a plaintiff to be appropriate under 42 U.S.C. §1988, the court must find that the suit was frivolous or brought with the purpose of embarrassment, harassment or vexation. *Goff v. Texas Instruments Incorporated*, (D.C. Tex. 1977) 429 F. Supp. 973; *Bennett v. Cramer*, (C.D. Wisc. 1980) 495 F. Supp. 191. A finding of bad faith is not required. *Nash v. Reedel*, (D.C. Penn. 1980) 86 FRD 16. An award of attorney's fees requires only that the court find that the original plaintiff lacked probable cause in bringing his lawsuit. In the recent case of *Harbulak v. County of Suffolk*, (2nd Cir. 1981) 654 F. 2d 194, the Second Circuit found that in a frivolous civil rights lawsuit the lower court had abused its discretion in *not* awarding attorney's fees to the defendant County of Suffolk.

As this honorable court is well aware, plaintiffs commonly file lawsuits against public entities and their police officer employees for false arrest, excessive force and related torts under the Civil Rights Act. Had Bozek chosen to make the same allegations under the Civil Rights Act (which under California law could have been filed in Federal or State court, *Williams v. Horvath*, [1976] 16 Cal. 3d 834, 129 Cal. Rptr. 453, 548 P. 2d 1125), petitioner could have attempted to recoup its attorney's fees under 42 U.S.C. §1988. In doing so the petitioner would not have had to prove malice, but only a lack of probable cause. However, having alleged the same facts under State causes of action,

the court below found that Bozek was shielded from an attempt to recover the same damages pursuant to an absolute privilege conferred by the First Amendment to the United States Constitution.

B. The Policy of Deterring Groundless Lawsuits, Which Underlies the Tort of Malicous Prosecution, Is Particularly Applicable to Public Entities and the Taxpayers Who Ultimately Pay the Bill for the Defense of Groundless Lawsuits.

As previously discussed, the deterrence of groundless lawsuits is a legitimate policy consideration underlying the tort of malicious prosecution. It is submitted that with respect to public entities and their taxpayers, this consideration is particularly pertinent. In a recently conducted national survey of lawsuits naming police officers as defendants, it was indicated that the number of federal and state civil suits alleging misconduct against state and local law enforcement personnel had increased from approximately 1,723 lawsuits in 1967, to 10,633 in 1976. *Impact* [1980] No. 7, published by Americans for Effective Law Enforcement, page 2. It was further estimated that truly legitimate complaints were far overshadowed by groundless claims. The records of the City of Long Beach reflect a similar rise in claims and lawsuits of this nature.

Nor does the rationale of the court's decision purport to be limited to police misconduct lawsuits. If the First Amendment analysis of the majority opinion is correct, an individual who sues a public entity for *any* reason is entitled to the absolute protection of the First Amendment. The court's decision therefore has an enormous potential effect on all public entities, whether they be cities, counties, school districts, special districts, etc., throughout the state of California. All public entities are henceforth precluded from

filing malicious prosecution actions, no matter how malicious and unfounded the original action. Against the background of an explosion in litigation against public entities, it is inherently unfair to deprive them and their taxpayers of a legitimate tool in response to this phenomenon.

Conclusion.

As evidenced by the foregoing, the court below has improperly interpreted the scope of the First Amendment to the United States Constitution to prohibit a public entity from filing a malicious prosecution action after having been the victim of a groundless, maliciously inspired lawsuit. It is of the utmost importance that the scope of the right to petition of the First Amendment to the United States Constitution, be properly defined in conformity with prior holdings of this honorable court. Additionally, the decision of the court below, if allowed to stand, will significantly impact public entities in their attempts to recover taxpayer funds expended in defense of groundless lawsuits and in their efforts to deter the explosion of litigation against public entities.

For these reasons, a Writ of Certiorari should issue to review the judgment of the Supreme Court of the State of California.

Dated: August 26, 1982.

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